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## **SUMMARY**

CIRI supports the development of a secondary market for spectrum, but believes that a truly robust and competitive secondary spectrum market requires that certain regulatory barriers be meaningfully lowered or eliminated. To promote the success of the secondary market, the Commission must ensure that competition and rules of the marketplace drive the use of spectrum, not additional regulation. The opportunity to lease a portion of a spectrum license may effectively increase the number of parties who can take advantage of limited spectrum and will create additional opportunities for all licensees and particularly for small and minority-owned businesses so long as all participants in the secondary market have an unrestricted right to compete for spectrum in the secondary market. To this end, the Commission must establish rules to govern the secondary market that will not disadvantage entrepreneurs. Opening up secondary markets should not be an opportunity only for large companies and nationwide providers; the Commission should not restrict the ability of current and future entrepreneurs to participate fully not only in traditional licensing proceedings but in the secondary market as well.

To accomplish these goals, CIRI believes that the Commission should hold both the spectrum licensee and any lessees directly responsible for compliance with the Communications Act and the Commission's rules, and should establish a post-lease notice application that would have to be filed by the licensee and the lessee to facilitate regulatory oversight of leasing arrangements. CIRI supports allowing a licensee that enters into a long-term spectrum lease to rely on the activities of its lessee in certifying achievement of applicable construction and service benchmarks, but believes that such spectrum should be attributed to both the licensee and lessee for purposes of the spectrum cap rule. In addition, CIRI believes that a licensee that received a bidding credit in connection with the award of a license should be

required to make an unjust enrichment payment if the licensee enters into a long-term lease of the spectrum with an entity that would not qualify to receive a similar bidding credit. Finally, CIRI supports replacing the *Intermountain Microwave* criteria for the purpose of evaluating Section 310(d) control issues in the spectrum leasing context with a minimum requirement that the licensee retain the ultimate right to terminate a lease for cause, including for a lessee's noncompliance with the Commission's rules. In this way, the Commission's proposal to allow lease arrangements between licensees and third parties in the secondary spectrum market will increase competition and serve the public interest.

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In the Matter of )  
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 Promoting Efficient Use of Spectrum ) WT Docket No. 00-230  
 Through Elimination of Barriers )  
 to the Development of Secondary Markets )  
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## COMMENTS OF COOK INLET REGION, INC.

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## I. INTRODUCTION.

Given the current state of the industry – including the increasing demand for and resulting scarcity of spectrum<sup>1</sup> – CIRI supports the development of a secondary market for spectrum through lowered regulatory barriers. But a truly robust and competitive secondary spectrum market requires that certain regulatory barriers be *meaningfully* lowered or, to the extent possible, eliminated altogether. In order for the Commission to effectively accomplish its goals in this proceeding – to enable licensees to make more efficient use of their spectrum and to facilitate flexible arrangements between licensees and other entities that will serve the public interest in a manner consistent with the Commission’s rules<sup>2</sup> – the Commission must ensure that competition and rules of the marketplace drive the use of spectrum in the secondary market, not additional regulation. The opportunity to lease a portion of a spectrum license may effectively increase the number of parties who can take advantage of this limited resource to test and develop innovative services which might not support an independent investment in an auctioned license. As discussed in more detail in these comments, so long as both the licensee and lessee are directly responsible for continued compliance with the Commission’s rules, the decisions made by the licensee and lessee on the secondary market as to how the spectrum will be used will encourage the introduction of a broader array of innovative services, increase competition, reduce prices and serve the public interest.

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<sup>1</sup> See *In the Matter of Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, ¶¶ 3-7 (released Dec. 1, 2000) (“*Policy Statement*”).

<sup>2</sup> See *In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, FCC 00-402, Notice of Proposed Rulemaking, ¶ 15 (released Nov. 27, 2000) (“*Notice*”).

Most importantly, the Commission should ensure that all wireless licensees have an equal opportunity to offer spectrum on the secondary market and that all other third parties have equal access to such spectrum that is offered for leasing. All participants in the secondary market must have an unrestricted right to compete for spectrum. To this end, the Commission must establish rules to govern the secondary market that will not disadvantage entrepreneurs. A flourishing secondary spectrum market will create additional opportunities for all licensees and particularly for small and minority-owned businesses. Specifically, the opportunity to lease some or all of a spectrum license will give entrepreneurs an alternative revenue source, which could be particularly critical for the future success of small and minority owned business who may not have the same access to additional capital as larger operators.

To the extent that a secondary market creates an alternative to the Commission's traditional spectrum distribution methods – primarily auctions – the Commission should not ignore the congressionally mandated principles that guide its auction policies.<sup>3</sup> Opening up secondary markets should not be an opportunity only for large companies and nationwide providers; the Commission should not restrict the ability of current and future entrepreneurs to participate fully not only in traditional licensing proceedings but in the secondary markets as well. By imposing special restrictions on entrepreneur participation in the secondary market the Commission would frustrate the policy goals of the entrepreneur program and the goals of this proceeding.

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<sup>3</sup> See 47 U.S.C. § 309(j) (demonstrating general congressional concern for small and minority-owned businesses by directing the Commission to promote the objective of “disseminating licenses among a wide variety of applications, including small businesses . . . and businesses owned by members of minority groups”).

**II. THE LICENSEE AND LESSEE SHOULD BOTH BE RESPONSIBLE FOR COMPLIANCE, AND THE COMMISSION SHOULD ESTABLISH A POST-LEASE NOTICE APPLICATION TO FACILITATE REGULATORY OVERSIGHT OF LEASING ARRANGEMENTS.**

In the *Notice*, the Commission proposes that a licensee who participates in secondary market leasing arrangements should retain ultimate responsibility for compliance with the obligations of the Communications Act and the Commission's rules.<sup>4</sup> The issue regarding the extent to which a lessee is directly responsible for complying with the Commission's requirements in connection with its operations on spectrum it uses pursuant to a lease, as well as several other issues raised by the Commission in the *Notice*, can be simply addressed by establishing a post-lease notice application that would have to be signed and filed by the licensee and lessee no later than thirty days after the execution of a lease.<sup>5</sup> This notice application should elicit basic information from both the licensee and lessee, as well as a description of the commercial terms of the lease agreement (including, for example, the duration of the lease, the amount of spectrum to be leased and the type of services to be offered by the lessee). In addition, the lessee would be required to certify directly to the Commission that it will: (1) comply with the Communications Act and the Commission's rules; (2) accept Commission oversight and enforcement with respect to the lessee's activities consistent with the terms of the

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<sup>4</sup> See *Notice* at ¶ 29.

<sup>5</sup> This notice application would be comparable to the post-transaction application used by the Commission to facilitate the streamlined processing of certain *pro forma* transfers of control and assignments. See *Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers and Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, FCC 98-18, *Memorandum Opinion and Order*, 13 FCC Rcd 6293, 6311 (1998) (the "*Forbearance Order*") (eliminating requirement that licensees seek pre-transaction approval of certain *pro forma* transactions so long as such licensees comply with certain requirements to provide post-transaction information).



license; and (3) cooperate fully with any investigation or inquiry conducted by the Commission in connection with the lessee's compliance.<sup>6</sup> By requiring a lessee to file a notice application, the Commission can directly exercise its regulatory authority over the lessee in the context of the lessee's operations using the spectrum it leases. The notice application creates a regulatory foundation for the Commission to impose directly on the lessee the obligation to conform its operations to comply with the Communications Act and the Commission's rules and to serve the public interest, rather than relying solely on the licensee to police the activities of its lessees.

By giving the Commission direct regulatory authority over a lessee's use of secondary market spectrum, the notice application helps resolve a number of the difficult policy and regulatory issues raised in the *Notice*. Not only is it reasonable and appropriate for the Commission to regulate service providers who utilize scarce spectrum resources, even where such service providers are not themselves the direct licensees of the spectrum, imposing all obligations for regulatory compliance solely on the licensee is unreasonably burdensome and may stymie the growth and development of a robust secondary market. While certain licensees may well decide, as a commercial matter, that a minimum level of due diligence with respect to its lessees is a reasonable business precaution, it is unreasonable for the Commission to require each licensee to act as a regulator to ensure not only current but continued compliance by its lessees with the Commission's rules. As the Commission has recognized, "administrative requirements [may] create transaction and opportunity costs that exceed potential benefits that

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<sup>6</sup> In the *Notice*, the Commission suggests that the terms of the agreement between the licensee and the lessee could define the above-referenced lessee obligations. *See Notice* at ¶ 30. However, if these lessee obligations only are addressed in the private contract between the licensee and the lessee, the Commission might not have the necessary direct regulatory authority over the lessee to ensure compliance.

may accrue from making all or part of their spectrum license available to others.”<sup>7</sup> For small businesses, in particular, a due diligence obligation would be prohibitively expensive and the risk of potential fine or forfeiture so great that entrepreneur licensees will be discouraged from full participation in the secondary market if a licensee is made solely responsible for its lessees’ operations as well as its own.

This does not suggest that a licensee should be able to abdicate all responsibility for the operations of lessees on its spectrum but rather that the responsibility for compliance should be shared by the licensee and its lessees. Each licensee should remain ultimately responsible for compliance with the Commission’s rules, so long as the licensee is provided with notice of any noncompliance by the lessee and a reasonable opportunity to cure such noncompliance before the Commission takes any action to fine the licensee or revoke the license. For example, if a third party files a complaint because of a lessee’s interference with the operations of other licensees’ operations, both the lessee and licensee should receive notice of such noncompliance. Then, while the Commission could take immediate action to fine the lessee or enjoin its noncompliant operations, the licensee would have a period of time to work with the lessee to ensure compliance or, if necessary, terminate the lease agreement. If the licensee similarly failed to act within a certain period, it might then be appropriate for the Commission to penalize the licensee directly. Again, however, licensees might well be unwilling to risk the loss of their valuable spectrum licenses based on the activities of lessees that may occur without the knowledge of the licensee, and imposing all of this risk on licensees will further stall the development of secondary markets.

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<sup>7</sup> See *Policy Statement* at ¶ 15.

Finally, the filing of a notice application within a period of time after the execution and commencement of secondary market leases would serve a critical public notice function by facilitating the collection and availability of leasing information using the Commission's existing electronic filing system. Other interested parties could rely on a search of notice applications to determine whether certain spectrum in various markets has already been leased or might be available on the secondary market.

### **III. ENTREPRENEUR RESTRICTIONS SHOULD NOT APPLY TO LESSEES.**

Many C and F block broadband PCS licenses are held by businesses that qualify as "entrepreneurs" (or "designated entities") under the Commission's wireless service rules. In the *Notice*, the Commission questions whether existing entrepreneur licensees should be restricted to leasing spectrum only to parties that also could themselves qualify as entrepreneurs.<sup>8</sup> While such a restriction may superficially appear to have regulatory consistency, it would in fact hamstring entrepreneur licensees by eliminating their ability to participate meaningfully in the secondary market and to compete effectively in an already highly competitive and rapidly changing industry.

Economic consolidation is driving the wireless telecommunications industry toward domination by a limited number of very large, nationwide players. While large players tout nationwide, seamless roaming and uniform pricing throughout their systems, entrepreneur licensees – by definition smaller participants – do not have a national scope and do not enjoy the economies of scale of national and international carriers. Moreover, consolidation in the wireless industry continues apace: there are fewer than half as many competitors in the wireless

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<sup>8</sup> See *Notice* at ¶ 47.

business today than there were at the conclusion of the C block auctions in 1997. Those small players left after a large industry consolidation are especially vulnerable as the large participants exercise their considerable market power and cost advantages.

Restricting the ability of entrepreneur licensees to lease their spectrum only to other entrepreneurs would unnecessarily, and perhaps fatally, limit the options of these licensees as they seek to survive in the new wireless landscape. Rather, the Commission should permit entrepreneurs to lease to any party that otherwise satisfies the requirements generally imposed by the Commission on secondary market arrangements (including filing a notice application). Far from abrogating the policies underlying entrepreneur licenses, unrestricted leasing would give entrepreneurs a mechanism for raising needed capital to build out and operate their systems in unleased license areas or to support new and innovative niche services. Furthermore, unrestricted leasing of entrepreneur licenses could create additional opportunities to facilitate efficient spectrum usage through leasing.

The Commission recently recognized that industry trends and spectrum demands call for relaxing certain restrictions on entrepreneur licenses when it opened bidding on certain C and F block licenses for Auction No. 35.<sup>9</sup> The objectives of the entrepreneur program and auctions are various and sometimes competing, “including economic opportunity, competition, and the rapid deployment of new technologies and services by, *inter alia*, disseminating licenses among a wide variety of applicants, including small businesses.”<sup>10</sup> The Commission sought to

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<sup>9</sup> See *In re Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, FCC 00-313, ¶ 17 (released Aug. 29, 2000) (“*Sixth Report and Order*”).

<sup>10</sup> *Id.* at ¶ 22 (citing 47 U.S.C. § 309(j)(3)).

balance as many of these objectives as possible when it opened bidding on previously restricted licenses. Similarly, the Commission has recently modified the requirements to qualify as an entrepreneur to provide flexibility for such licensees to obtain additional capital.<sup>11</sup> Lifting restrictions on entrepreneur licensees' ability to lease spectrum on the secondary market is simply another application of the Commission's realistic approach to the entrepreneur program. Allowing entrepreneurs to lease some or all of their spectrum to any third party would promote economic opportunity, competition, and rapid technology deployment while providing entrepreneurs another source of revenue to finance their own operations. Because it would place them on a level playing field with other auction winners, entrepreneurs would be better able to retain ultimate control over their licenses and determine the services to be provided over their spectrum; thus, the goal of wide dissemination of scarce spectrum among a variety of licensees would be served. Allowing unrestricted leasing would serve to help level the competitive playing field between entrepreneurs and their larger competitors and encourage the continued success of small businesses as wireless spectrum licensees.

#### **IV. LEASING SHOULD NOT ALLOW PARTIES TO CIRCUMVENT SPECTRUM CAP ATTRIBUTION RULES.**

In the *Notice*, the Commission queries whether licensed spectrum that falls under the commercial mobile radio service ("CMRS") spectrum cap rule should be attributable to the licensee, to the spectrum lessee, or both, for the purpose of determining compliance with the

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<sup>11</sup> See *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking*, ¶ 65 (released Aug. 14, 2000) ("We decline to adopt a minimum equity requirement for controlling interests because it is contrary to our goal of providing legitimate small businesses maximum flexibility in attracting passive financing.").

cap.<sup>12</sup> In order to satisfy the Commission's existing policy objectives that supported the imposition of the spectrum cap (*i.e.*, safeguard competition in the CMRS market), any spectrum that is leased on the secondary market should be attributable both to the licensee and the lessee for purposes of the existing spectrum cap rule. The Commission is re-examining the policies underlying the spectrum cap in a separate and ongoing proceeding.<sup>13</sup> Any changes to the spectrum cap rules adopted in that proceeding similarly should similarly apply both to any licensee and lessee that enters into any spectrum lease on the secondary market.

**V. A LICENSEE ENTERING A LONG-TERM LEASE SHOULD BE ABLE TO RELY ON LESSEE ACTIVITIES TO MEET CONSTRUCTION OR SERVICE BENCHMARKS.**

The *Notice* proposes to permit a licensee to rely on the activities of its lessees for the purpose of meeting applicable construction and service benchmarks.<sup>14</sup> Any licensee entering into a long-term lease should be allowed to rely on the activities of these lessees in certifying its achievement of applicable construction and service benchmarks. On the other hand, no licensee should be allowed to rely on the activities of lessees under agreements of limited duration to meet applicable construction and service benchmarks.<sup>15</sup> The duration of the lease therefore should be a critical factor for whether a licensee may rely on its lessee's operations to achieve its own construction benchmarks, as well as other factors such as the geographic area served by the spectrum and the size of the spectrum block being leased and the type of service being offered by the lessee.

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<sup>12</sup> See *Notice* at ¶ 49.

<sup>13</sup> See *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, *Notice of Proposed Rulemaking* (released Jan. 23, 2001).

<sup>14</sup> See *Notice* at ¶ 50.

**VI. A LICENSEE WHO RECEIVED A BIDDING CREDIT SHOULD BE REQUIRED TO REIMBURSE THE GOVERNMENT WHERE IT LEASES ITS SPECTRUM IN THE SECONDARY MARKET ON A LONG-TERM BASIS.**

The *Notice* seeks comment as to whether a licensee that received a bidding credit in connection with the original award of a license should be required to reimburse the government for such bidding credit pursuant to the Commission's unjust enrichment rules if the licensee leases spectrum to an entity that would not meet the eligibility standards for a similar bidding credit.<sup>16</sup> Under these circumstances, a licensee who received the benefit of a bidding credit in an open auction who subsequently enters into a long-term lease should be required to repay some or all of the bidding credit from the revenues generated from the lease. This requirement would be consistent with past Commission decisions to facilitate the transferability of spectrum licenses by eliminating the five-year holding period requirements but retaining the unjust enrichment payment obligations for licensees who assign or transfer their licenses to third parties who would not have qualified for similar bidding credits.<sup>17</sup> As the Commission previously concluded, eliminating the unjust enrichment payment obligations altogether is not appropriate in open auctions where certain licensees received the benefit of the bidding credit and the use of the credit may well have influenced the outcome of the original auction.<sup>18</sup> Just as the Commission does not want licensees to take advantage of the bidding credit only to assign or transfer its licenses to another party for economic gain, the Commission should not want to allow

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<sup>15</sup> The Commission should establish a rebuttable presumption that short-term leases are those that are one year or less in duration. *See Notice* at ¶ 54 (positing that a short-term lease could be any lease that is one year or less in duration); *but see infra* note 20.

<sup>16</sup> *See id.* ¶ 53.

<sup>17</sup> *See Sixth Report and Order* at ¶ 51.

<sup>18</sup> *See id.*

licensees to obtain significant revenues by leasing its spectrum on the secondary market without repaying some or all of the bidding credit.

A reasonable schedule for repayment might be a form of reverse phase out depending on the number of years of a long-term lease during the first five years of the license, consistent with the existing unjust enrichment rules. Thus, the Commission might require a repayment of twenty percent of the bidding credit where a licensee enters into a one-year lease for all of its spectrum during the first five years of the license, and full repayment of the bidding credit if the licensee enters into a lease for the full initial five-year term. Again, the amount of spectrum being leased should be a factor in determining the size of the unjust enrichment payment required. However, a licensee should be free to enter into short-term excess capacity or market trial leases without making a required unjust enrichment payment because such leases might serve the public in other ways, such as by encouraging efficient use of spectrum or the development and trial of new or emerging technology. Furthermore, if a licensee is not entitled to rely on the activities of short-term lessees in meeting applicable construction or service benchmarks, such a licensee should not have to repay bidding credits when it enters into short-term leases with entities that would not meet the relevant bidding credit eligibility standards.<sup>19</sup>

**VII. THE *INTERMOUNTAIN MICROWAVE* CRITERIA SHOULD NOT BE APPLIED TO EVALUATE SECTION 310(D) CONTROL ISSUES IN THE SPECTRUM LEASING CONTEXT.**

The Commission tentatively concludes in the *Notice* that the factors set forth in *Intermountain Microwave* are not appropriate for determining under Section 310(d) of the

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<sup>19</sup> The presumption that a lease of less than one year is a short term might be rebutted, however, by evidence that the parties entered into successive short-term leases or repeatedly renewed a short-term lease in order to circumvent the requirement of repaying bidding credits. The Commission can address this issue on a case-by-case basis using the information supplied in the post-lease notice application.



Communications Act whether a licensee retains sufficient control over its license in the spectrum leasing context.<sup>20</sup> While the Commission should impose certain requirements on licensees who lease spectrum to third parties, these requirements should be distinct from traditional indices of control used by the Commission in other contexts. By requiring that a licensee and lessee file a post-lease notice application, the Commission could exercise its regulatory authority directly over both the licensee and lessee and ensure that both parties continue to comply with the Commission's rules.<sup>21</sup> The Commission also should require each licensee to retain the ultimate right to terminate the lease for cause, including substantial noncompliance by the lessee with the Commission's rules and the failure of the lessee to correct its operations in order to comply.<sup>22</sup> The certifications and other disclosures required in the notice application regarding each of the licensee's and the lessee's obligations, coupled with the licensee's ultimate contractual right to terminate any lease, should be sufficient to ensure a licensee's continued ultimate control over its spectrum license.

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<sup>20</sup> See *Notice* at ¶ 78.

<sup>21</sup> As mentioned above, the Commission should give any licensee notice where the Commission finds that a lessee is operating in violation of the Commission's rules and provide the licensee with an opportunity to cure such noncompliance.

<sup>22</sup> Separate consideration should be given by the Commission of appropriate regulatory remedies to terminate a lease in the event a lessee files for bankruptcy protection during the term of a lease or otherwise in the event of a lessee's willful disregard of the Commission's rules. As the Commission has seen in the recent past, the bankruptcy of a Commission licensee raises difficult legal and practical issues; a bankruptcy situation can become even more complex with the introduction of leasing. Specifically, in the event a lessee files for bankruptcy, the licensee may be limited under bankruptcy law in its ability to terminate effective its lease agreement with the bankrupt party. The Commission should take note of the complexities that may arise in these situations and, at a minimum, should be willing to address the problems these situations may create by granting a licensee some flexibility in meeting its construction deadlines or otherwise complying with the Commission's rules, in order to ensure that the bankruptcy of a lessee does not prejudice the licensee or the license.

## VIII. CONCLUSION.

The Commission's proposal to allow lease arrangements between licensees and third parties in the secondary spectrum market presents a unique opportunity to encourage the efficient use of spectrum. Spectrum leases would be of particular importance for existing entrepreneur licensees, who could take advantage of revenues from short or long-term spectrum lease arrangements to support their own independent operations as well as the flexibility lease agreements provide to build out competitive wireless services. So long as the Commission retains some minimum level of regulatory control over lessees, the changes proposed in the *Notice* will increase competition and serve the public interest.

Respectfully submitted,

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